

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE :
 :
 v. : ID 0911008358
 :
 LESLIE D. SMALL, :
 a/k/a KENNY WILLIAMS, :
 :
 Defendant. :

MEMORANDUM OPINION

*Upon Defendant's Motion to Declare the Death Penalty
Unconstitutional. Denied.*

Submitted Date: August 17, 2010
Decided Date: January 20, 2011

Peggy Marshall, Esquire and David Hume, IV, Esquire, Deputy Attorneys General,
Department of Justice, Georgetown, Delaware, attorneys for the State.

E. Stephen Callaway, Esquire and John P. Daniello, Esquire, attorneys for the
Defendant.

STOKES, J.

This is my decision on Defendant Leslie D. Small's Motion to Declare the Death Penalty Statute Unconstitutional under the Sixth Amendment. For the reasons explained below, the Motion is denied.

Defendant argues that 11 *Del.C.* § 4209(d)(2) is unconstitutional because, after a jury unanimously finds the presence of a statutory aggravating factor beyond a reasonable doubt, the trial judge determines whether the aggravating factors outweigh the mitigating factors under the preponderance of the evidence standard. Defendant asserts that placing the final weighing process in the hands of the judge and requiring use of the preponderance of the evidence standard are fundamental flaws that render Delaware's death penalty scheme unconstitutional under the Sixth Amendment.

Discussion. In *Apprendi v. New Jersey*, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.¹ In *Ring v. Arizona*, the Court applied *Apprendi* to the Arizona death penalty sentencing statute and found it to be unconstitutional because it required a judge to make factual findings as a prerequisite to imposition of the death penalty.² The Court held that the Arizona statute violated the defendant's Sixth Amendment right to trial by jury.³

¹530 U.S. 466 (2000).

²536 U.S. 584 (2002).

³*Id.*

Following *Ring*, 11 *Del. C.* § 4209(e) was amended to provide that the death penalty may be imposed only if jury finds unanimously, or the judge where applicable, the existence of at least one statutory aggravator beyond a reasonable doubt. The amended statute has been found to meet constitutional standards. In *Brice v. State*,⁴ the Court found the statute to be constitutional and to comport with *Ring v. Arizona*. The Delaware Supreme Court has not deviated from this position.

In *Swan v. State*, the Court reaffirmed the constitutionality of our death penalty statute, stating that *Brice* put to rest any issues pertaining to the fact-finding role of the jury and the trial judge. “Once a jury finds unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, the defendant becomes death eligible and *Ring*’s constitutional requirement of jury fact-finding is satisfied.”⁵

In *Starling v. State*, the Court rejected the argument that the trial judge impermissibly makes the final sentencing decision.⁶ That decision cannot be made without the jury’s unanimous finding of a statutory aggravator:

Although a judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors, it is not that determination that increased the maximum punishment. Rather, **the maximum punishment is increased by the jury’s unanimous finding beyond a reasonable doubt of the statutory aggravator.** At that point a judge can sentence a defendant

⁴815 A.2d 314 (Del. 2003).

⁵*Swan v. State*, 820 A.2d 342, 359 (Del. 2003) (citing *Brice v. State*, 815 A.2d 314 (Del. 2003)).

⁶882 A.2d 747 (Del. 2005).

to death, but only if the judge finds that the aggravating factors outweigh the [mitigating] factors. Therefore the weighing of aggravating circumstances against mitigating circumstances does not increase the punishment. Rather, it ensures that the punishment imposed is appropriate and proportional.⁷

In *Blakely v. Washington*,⁸ the federal Supreme Court held that the state court's sentencing of the defendant to more than three years above the 53-month statutory maximum on the basis of the judge's finding of deliberate cruelty on the part of the defendant violated the defendant's right to trial by jury. Although not a death penalty case, *Blakely* is relevant here because it pertained to a defendant receiving a "sentence greater than what state law authorized on the basis of the verdict alone."⁹

In *Ortiz v. State*, our Supreme Court found that Delaware's hybrid system of sentencing, which provides for the jury to find the defendant death eligible and the judge to impose the death penalty, does not violate the right to trial by jury.¹⁰ The Court stated that Ortiz became death-eligible under *Apprendi* and *Ring* when his jury unanimously found beyond a reasonable doubt the existence of one of the statutory aggravating circumstances. The Court further found that the statutory structure of Delaware's capital sentencing statute is consistent with the standard set by the federal Supreme Court.¹¹ Delaware's sentencing

⁷*Id.* at 757 (citations omitted) (emphasis added).

⁸542 U.S. 296 (2004).

⁹*Id.*

¹⁰869 A.2d 285 (Del. 2005).

¹¹*See Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

statute is consistent with *Ring*'s reminder that "[c]apital defendants, no less than non-capital defendants. . . are entitled to a jury finding of any fact on which the legislature conditions an increase in their maximum punishment."¹²

Established law does not support Defendant's argument that the jury must engage in the final weighing process. This argument is without merit.

Defendant also argues that use of the preponderance of the evidence standard in the final weighing process renders 4209(d) unconstitutional. In *Gattis v. State*, our Supreme Court found that the argument that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt overstated the *Apprendi* holding.¹³ *Gattis* relied on *Brice*, in which the Court was asked to determine whether a jury must find beyond a reasonable doubt that all aggravating factors found to exist outweigh all mitigating factors found to exist.¹⁴ In answering this question, *Brice* observed that the standard for the Court's weighing process is a preponderance of the evidence.¹⁵ Thus, the preponderance of the evidence is the appropriate standard under the Sixth Amendment.¹⁶ It is a unanimous jury or a judge sitting without a jury that finds beyond a reasonable doubt whether a defendant is death eligible, and the Delaware statute is therefore consistent with *Apprendi v. New*

¹²*Ring v. Arizona*, 536 U.S. at 584.

¹³955 A.2d 1276, 1289 (Del. 2008).

¹⁴*Brice v. State*, 815 A.2d at 318.

¹⁵*Id.* at 322.

¹⁶*State v. Price*, 2009 WL 3765502, at *3 (Del. Super.).

*Jersey*¹⁷ and *Ring v. Arizona*.¹⁸

Defendant states in conclusory fashion that certain cases from other jurisdictions support his position that the weighing process is a fact-finding process subject to the standard of beyond a reasonable doubt. As explained in this Court's opinion in *State v. Price*,¹⁹ these cases are not applicable to the issue Defendant has raised under 11 *Del. C.* § 4209, as reiterated below.

In *Woldt v. People*,²⁰ the Colorado Supreme Court held that a death penalty sentencing scheme consisting entirely of a judicial fact-finding process was unconstitutional under *Apprendi*. Such a process is nothing like the Delaware statute and is not relevant to this case.

In *State v. Whitfield*,²¹ the Missouri Supreme Court held that under *Apprendi* eligibility for the death penalty must be determined by a jury. This is consistent with the Delaware statute, as previously explained.

In *Johnson v. State*,²² the Supreme Court of Nevada held that a statute violated the right to a jury trial in its provision for a judge to make findings in a death penalty hearing when the jury is deadlocked. No such provision exists in Delaware law.

¹⁷530 U.S. 466 (2000).

¹⁸536 U.S. 584 (2002).

¹⁹2009 WL 3765502 (Del.Super.).

²⁰64 P.3d 256 (Colo. 2003).

²¹107 S.W. 256 (Mo. 2003).

²²59 P.3d 450 (Nev. 2002).

Finally, in *Olsen v. State*, the Wyoming Supreme Court observed that a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty but remanded the case to the trial court because one of the aggravators was faulty.

None of these pertains to whether the trial judge should conduct the weighing process by a preponderance of the evidence or by a reasonable doubt. The Delaware statute, which specifies the preponderance of the evidence standard, meets constitutional requirements under the Sixth Amendment right to trial by jury.²³

Under well-settled Delaware law, Defendant's motion to declare that 11 *Del. C.* § 4209 is unconstitutional under the Sixth Amendment is **DENIED**.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary

²³*State v. Price*, 2009 WL 3765502, at *3 (Del. Super.).